(1)

90-154

Supreme Court, U.S.
FILED
JUL 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

NUMBER A - 920

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

ELIJAH DAVIS,
PETITIONER

VERSUS

UNITED STATES POSTAL SERVICE,
RESPONDENT

OCTOBER TERM 1990

ON WRIT OF CERTIORARI TO THE
FIFTH CIRCUIT COURT OF APPEALS

PETITION FOR CERTIORARI

BENJAMIN JONES
JONES AND SMITH LAW OFFICE
P. O. BOX 3025
1110 JACKSON STREET
MONROE, LOUISIANA 71210
(318) 322-1126

ATTORNEY FOR PETITIONER

I. QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals was correct in affirming the dismissal of petitioner's *pro se* discrimination suit on the basis that the court lacked jurisdiction.

II. TABLE OF CONTENTS

	PAGE
Opinion Below	2
State of Jurisdiction	3
Statutory Provision Involved	3-4
Statement of the Case	4-8
Reasons for Granting Writ	8-10
Argument	10-13
Certificate	14
Appendix A	15-19
Appendix B	20-22
Appendix C	23
Appendix D	24-25

III. TABLE OF AUTHORITIES

	PAGE
Bell v. Veterans Administration Hospital 826 F.2d 357 (5th Cir. 1987)	9,17
Johnson v. Burnley, 887 F.2d. 471	9,11
Lamb v. United States Postal Service 852 F.2d. 845 (5th Cir. 1988)	17
Schoavone v. Fortune, 477 U.S. 21 106 S. Ct. 2379,912 Ed.2d 18 (1986)	10, 18
Statutes	
28 U.S.C. Sec 2101	3
42 U.S.C. Sec 2000e-5	4
42 U.S.C. Sec. 2000e-16(c)	2,3,8,10
Rules	
Supreme Court Rule 10.1(a)	3,10
Fed. R. Civ. P. 56	24

In the Supreme Court

of the United States

No. A-920

ELIJAH DAVIS,

Petitioner

versus

UNITED STATES POSTAL SERVICE,

Respondent

Petition For Writ of Certiorari

to the Honorable Fifth Circuit Court

of Appeals

The petition of Elijah Davis respectfully requests that a writ of certiorari issue herein to review the judgments and orders of the Fifth Circuit Court of Appeals rendered in this matter or February 6, 1990 and on March 20,

1990, dismissing petitioner's discrimination suit. In deciding to dismiss petitioner's suit, both the Federal District Court and the Fifth Circuit Court of Appeals interpreted the thirty-day period for filing a discrimination suit found in 42 U.S.C. Sec. 2000e-16(c) as being jurisdictional, rather than a statute of limitations.

IV. Opinions Below

The opinion rendered by the Fifth Circuit Court of Appeals was not published, but it is attached hereto as Appendix A. We have attached as Appendix B the Order denying a rehearing. And, as Appendix C, the order by which Mr. Justice White extended the time to file this petition to and including July 18, 1990.

V. Statement of Jurisdiction

The petitioner shows that this court has jurisdiction to provide discretionary review of this case based on Rule 10.1(a) of the Rules of this Honorable Court and 28 U.S.C. Sec. 2101. The Fifth Circuit Court of Appeals decision in this case is in conflict with decisions rendered on the same subject by several other circuits, as will be demonstrated herein in section VIII.

VI. Federal Statutory Provisions Involved

The statutory provision involved in this action is 42 U.S.C. Sec. 2000e-16(c), which provided as follows: "Within thirty days of receipt of notice of final action taken by a department, agency or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such

department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section... an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

VII. Statement of the Case

A. Statement of Facts

The petitioner was appointed as an employee of the United States Postal Service on January 19, 1985. He was assigned to duty as a carrier on one of the most difficult routes in Dallas,

Texas. Because he experienced continued difficulty in completing the route timely, he had some problems with management. He requested, but did not receive, help on the route; there is a procedure and a form for requesting such assistance.

Despite his best efforts, petitioner received warnings and a 7 and 14-day suspension, allegedly for unsatisfactory work performance. He was not allowed to grieve the 7-day suspension.

The evidence is expected to show at trial that petitioner is a black male , and that white persons who had worked that difficult route to which he was assigned received requested assistance.

The petitioner was terminated following the 14-day suspension. He exhausted the available administrative remedies, and an EEOC final notice was

issued and received by him on February 17, 1988.

B. Proceedings Below

On March 15, 1988, petitioner filed an application to proceed in forma pauperis, which application was denied. On May 5, 1988, petitioner filed suit in the United States District Court for the Northern District of Texas, Dallas Division. The petitioner was representing himself; he had no formal training in law, and had little concept of how federal courts apply court rules. He knew nothing about statutes of limitations or rules related to pleading and service of process.

Petitioner did not know to name the Postmaster General as a defendant when he filed suit, nor did he file the actual suit by April 15, 1988, which was the 30th day after he received the final

notice of right to sue from EEOC, where he had protested his termination on the basis of racial discrimination.

The United States Postal Service was named as defendant, and was served, along with the United States Attorney, who was served September 2, 1988.

On November 14, 1988 counsel for the Postal Service filed a motion to dismiss, which was treated as a motion for summary judgment and granted on December 16, 1988. Appendix D. Petitioner requested reconsideration, but the request was denied.

Petitioner appealed to the Fifth Circuit Court of Appeals, and on February 6, 1990 that court affirmed the dismissal. Rehearing was denied on March 20, 1990.

Petitioner secured the Rules of this Court to attempt to file this petition,

but later retained undersigned counsel, who requested and receive from Mr. Justice White a 30-day extension of time to file this petition.

VIII. Reasons For Granting Writ

The petitioner tried to represent himself and was unprepared to deal with all the rules and laws that applied. He was unable to hire counsel at the time suit was filed, and that is why he took on the task of being his own lawyer. Indeed, with little assistance, he represented himself in the Court of Appeals.

The petitioner has been denied his day in court, because his case has been dismissed on procedural grounds, namely, failure to sue within 30 days after February 17, 1988 and failure to name the Postmaster General as a Defendant. 42 U.S.C. Sec. 2000e-16(c).

The decision of the Fifth Circuit Court of Appeals takes the position that the District Court was correct in dismissing petitioner's suit because of his failure to sue the Postmaster General within 30 days after February 17, 1988. The court, relying on prior law of that circuit, found that the district court did not have jurisdiction to hear the case. Bell v. Veterans Administration Hosp., 826 F.2d 357, 360-61 (5th Cir. 1987). However, several other circuits have held that the 30-day requirement is not a jurisdictional matter, but essentially a statute of limitations, subject to equitable tolling. Johnson v. Burnley, 887 F.2d 471 (5th Cir. 1989).

Since there is a deep conflict in the circuits on the question of whether the 30-day filing requirement in 42

U.S.C. Sec. 2000e-16(c) is jurisdictional or a statute of limitations, this court is urged to take this case on certiorari to resolve the conflict. Rule 10.1(a). Further, this would be a proper case in which to apply equitable principles, so as to preserve petitioner's right to go to trial. He made a filing on or before the 30th day after he received the final EEOC notice, asking that he be allowed to prosecute his suit in forma pauperis. In the case of a person acting as his own lawyer, that should be sufficient to preserve his rights. And holding that this filing satisfied the 30-day limitations period would not seem to offend Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed.2d 18 (1986).

IX. ARGUMENT

It makes a great deal of difference to petitioner whether the

requirement that suit be filed within 30 days after final EEOC notice is treated as a statute of limitations or as a jurisdictional matter. And there is a conflict in the circuits in the matter. If the requirement is held to be a statute of limitations, then petitioner may still have a chance to present his case. On the other hand, if the requirement is held to be jurisdictional, petitioner would have no chance to ever present his evidence to a trial court.

As noted above, the circuits are badly split on the matter. The Third, Eighth, Tenth, Eleventh and D.C. circuits have taken the position that the 30 day delay is non-jurisdictional, while the Fifth, Seventh, and Ninth Circuits treat the requirement as being jurisdictional. These cases are collected in Johnson v. Burnley, 887 F 2d 471 (4th Cir. 1989), at

pp. 474-479, which case discusses this issue in great detail.

The petitioner urges this court to grant his petition, which presents this issue very clearly and pointedly. For, although there was some minor discussion of the substance of the case, the case turned squarely on the issue presented here.

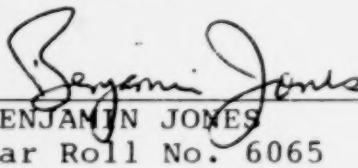
Conclusion

The Fifth Circuit was wrong in affirming the district court's holding that it lacked jurisdiction to hear petitioner's case, because the actual suit was not file naming the Postmaster General within thirty days after February 17, 1988. Five other Circuits have taken a different position, while two Circuits side with the Fifth.

Accordingly, petitioner prays that this Honorable Court grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully Submitted,

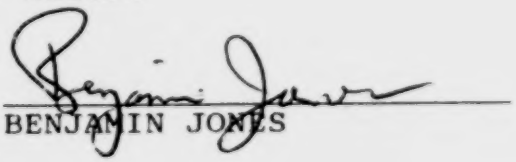
JONES & SMITH LAW OFFICES
1110 JACKSON STREET
POST OFFICE BOX 3025
MONROE, LOUISIANA 71210-3025
(318) 322-1126

BY: 

BENJAMIN JONES
Bar Roll No. 6065

Certificate

I hereby certify that three copies of the foregoing petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served upon the Honorable Kenneth W. Starr, Solicitor General of the United States, at his business address, U. S. Department of Justice, 10th and Constitution Avenue, Northwest, Room 5413, Washington D. C., 20530, this 17th day of July, 1990. I also certify that the Appendices attached are an accurate recordings from the copy of the documents in my files.



BENJAMIN JONES

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-1594

Summary Calendar

ELIJAH DAVIS,

Plaintiff-Appellant

versus

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States

District Court for the

Northern District of Texas

(CA-3-88-1008-R)

(February 6, 1990)

Before REAVLEY, KING, and JOHNSON, Circuit Judges.

APPENDIX A

JOHNSON, Circuit Judge:*

Elijah Davis appeals from the district court's dismissal of his employment discrimination suit and subsequent denial of Davis' motion for reconsideration. We affirm.

In the first eleven months of Davis' tenure as a postal carrier, he received one citation for unsatisfactory work performance, one seven day suspension for unsatisfactory performance, and one [1]

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

fourteen day suspension for unsatisfactory work performance. After exhausting his administrative remedies, Davis filed this suit seeking three million dollars in compensatory damages.

Because the district court correctly concluded that Davis failed to serve and give notice to the proper parties, dismissal was proper. A plaintiff must initiate suit in an employment discrimination complaint within thirty days of receiving the EEOC final agency decision. Bell v. Veterans Administration, 826 F.2d 357 (5th Cir.1987). In the instant case, the EEOC final notice was received on February 17, 1988.

In an employment discrimination suit against an agency, the plaintiff must name and serve the agency head. See Lamb v. United States Postal Service, 852 F.2d

845 (5th Cir.1988). Plaintiff failed to comply with this requirement. If, however, a plaintiff later amends to name the correct defendant, the amendment will relate back to the date of the original filing. Davis, however, cannot avail himself of the relation back doctrine. The relation back doctrine only applies where the proper party has received notice of the institution such that he will not be prejudiced, and either knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him. These requirements must be fulfilled within the statutory period, here being thirty days. Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986). In the instant case, service upon the postal service and the United States Attorney

did not occur until July of 1988. Because Davis cannot avail himself of the relation back doctrine, his complaint was not timely filed, and dismissal was proper.

AFFIRMED

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 89-1594

ELIJAH DAVIS,

Plaintiff-Appellant

versus

U. S. POSTAL SERVICE,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 02/06/90, 5 Cir., 198__, _____ F.2d_____)

(March 20, 1990)

Before REAVLEY, KING, and JOHNSON, Circuit Judges

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and

Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM JOHNSON
United States Circuit Judge

SUPREME COURT OF THE UNITED STATES

NO.

A-920

ELIJAH DAVIS,

Petitioner

v.

UNITED STATES POSTAL SERVICE

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including July 18, 1990.

/S/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 26th day of June, 1990.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

ELIJAH DAVIS, *

Plaintiff, *

U. S. POSTAL SERVICE, *

Defendant. *

ORDER

On November 14, 1988, defendant United States Postal Service moved to dismiss plaintiff Elijah Davis' complaint under Fed. R. Civ. P. 12(b)(1), or, in the alternative, under Fed R. Civ. P. 56. Plaintiff Davis has failed to respond to defendant's motion within the 20 days mandated by Local Rules 5.1(e). This court will consider defendant's motion as one for summary judgment. After careful consideration of the summary judgment record as a whole, this Court GRANTS defendant's motion for summary

judgement.

ACCORDINGLY, this Court ORDERS the following:

1. Defendant United States Postal Service's motion for summary judgment is GRANTED;

2. Plaintiff Elijah Davis' complaint is DISMISSED with prejudice.

SIGNED this 16th day of December, 1988.

/s/ Jerry Buchmeyer

UNITED STATES DISTRICT JUDGE
JERRY BUCHMEYER